

(30,668)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 703

HENRIETTA FIRST MOON, APPELLANT,

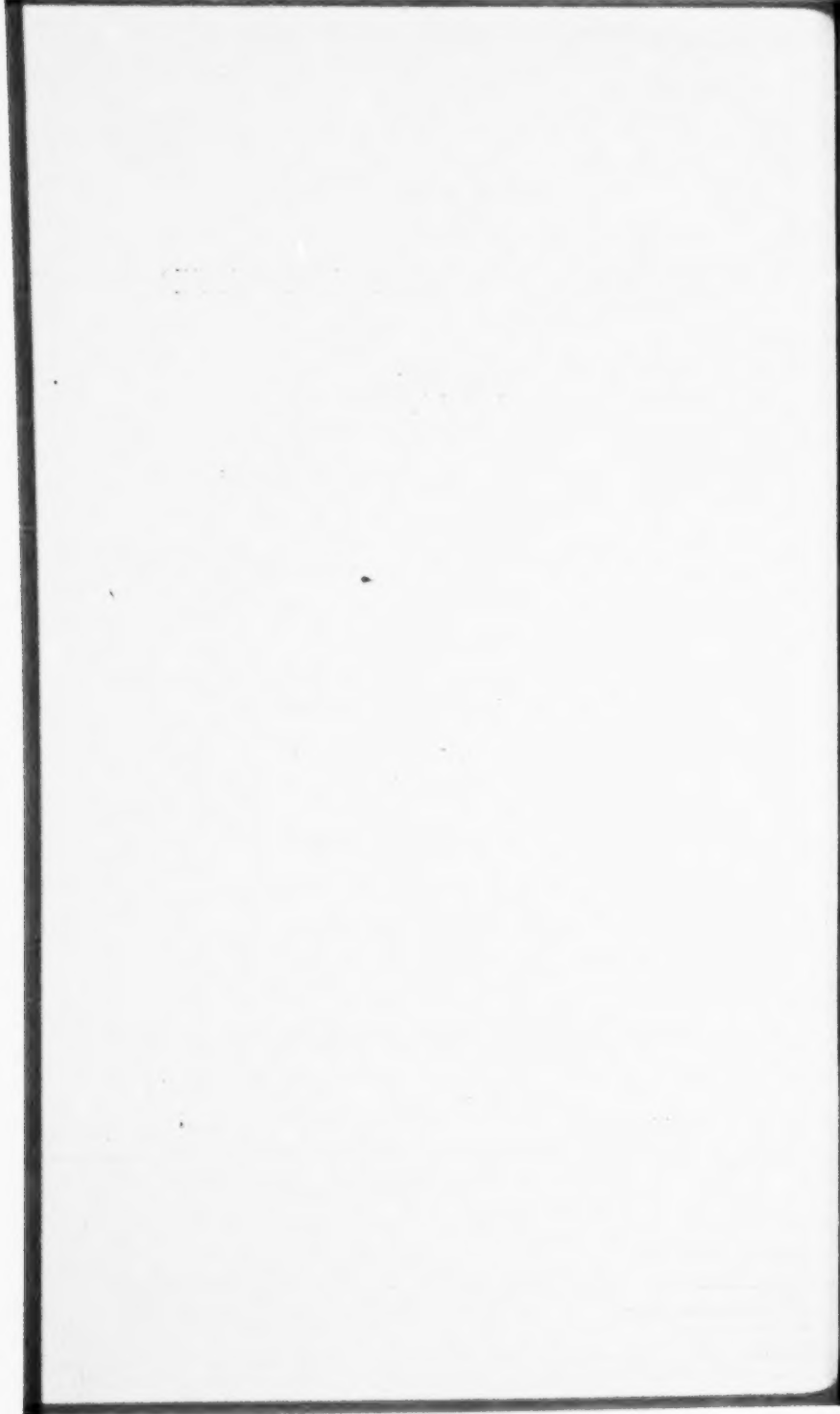
vs.

STARLING WHITE TAIL AND THE UNITED STATES OF
AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF OKLAHOMA

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[fol. 1] CITATION—In usual form, showing service on F. C. Duvall; filed September 22, 1924; omitted in printing

[fol. 2] **IN UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

In Equity. No. —

HENRIETTA FIRST MOON, Plaintiff,

vs.

STARLING WHITE TAIL and THE UNITED STATES, Defendants

BILL OF COMPLAINT

To the Honorable Judge of the District Court of the United States
for the Western District of Oklahoma:

Henrietta First Moon of Whiteagle, Oklahoma, and a citizen of the State of Oklahoma, brings this her Bill against Starling White Tail of Whiteagle, Oklahoma, a citizen of the State of Oklahoma, and an inhabitant of the Western District of Oklahoma:

That plaintiff is a member of the Ponca Tribe of Indians, is a full blood Ponca Indian and brings this action to establish her rights to certain Indian allotments which rights accrue to her by descent from one, Little Soldier, deceased Ponca Indian, allottee No. 475, 475-A, who was a full blood Ponca Indian, which said rights accrue to plaintiff under and by the provisions of the Act of Congress of February 8, 1887, 21 Stat. L. 388, as amended by the Act of Congress February 28, 1891, and under and by the provisions of the act of Congress of June 25, 1910, 26 Stat. L. 855.

That plaintiff is the owner of those certain interests in those certain lands and tenaments situated in the County of Kay, State of Oklahoma, and within the Western District of Oklahoma, described as follows, to wit:

[fol. 3] An undivided one-half ($\frac{1}{2}$) interest in and to the Southwest Quarter of the Northwest Quarter (S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$) of Section Sixteen (16), Township Twenty-five (25) North, Range One (1) East of the Indian Meridian; and the Northeast Quarter of the Northwest Quarter (N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$) of Section Twenty-three (23) Township Twenty-five (25) North, Range Two (2) East of the Indian Meridian; and Not No. Eight (8) Section Twenty-three (23), Township Twenty-five (25) North, Range Two (2) East of the Indian Meridian, same being lands formerly allotted to Little Soldier, deceased Ponca Allottee No. 475, 475-A.

An undivided one-half ($\frac{1}{2}$) interest in and to the South half of the Southwest Quarter (S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$) of Section Nine (9),

Township Twenty-five (25) North, Range One (1) East of the Indian Meridian, same being lands formerly allotted to Fred Holmes Little Soldier, deceased Ponca Allottee, No. 477;

An undivided seven-fifty fourths ($7/54$) interest in and to the West half of the Northeast Quarter ($W. \frac{1}{2}$ of the $N. E. \frac{1}{4}$) of Section Twenty-one (21) Township Twenty-five (25) North, Range One (1) East of the Indian Meridian, same being lands formerly allotted to Crooked Hand, deceased Ponca Allottee, No. 92;

An undivided one-twelfth ($1/12$) interest in and to the West Half ($W. \frac{1}{2}$) of Lot No. Five (5), Section Thirty-three (33), Township Twenty-five (25) North, Range One (1) East of the Indian Meridian, same being lands formerly allotted to Fred Crooked Hand, deceased Ponca Allottee, No. 94; and,

An undivided seven-forty eighths ($7/48$) interest in and to the Southeast Quarter of the Northeast Quarter ($S. E. \frac{1}{4}$ of the $N. E. \frac{1}{4}$) and Lot No. One (1), of Section Three (3), Township Twenty-five (25) North, Range One (1) East of the Indian Meridian; and the East Half ($E. \frac{1}{2}$) of Lot No. five (5), of Section Thirty-three (33) Township Twenty-five (25) North, Range One (1) East of the Indian Meridian, same being lands formerly allotted to Lela Crooked Hand, deceased Ponca Allottee, No. 95.

That plaintiff's said interest in said lands are of the value of more than \$3,000.00.

[fol. 4] That her said rights and interests in and to said described lands arose by virtue of her being the widow of one, Little Soldier, deceased Ponca Allottee No. 475, 475-A. That plaintiff and said Little Soldier were members of the Ponca Tribe of Indians and were married according to the custom of said Tribe in the State of Nebraska while the Tribe was living there some time prior to the year of 1880; that the exact date of said marriage is not known to this plaintiff and she is unable to plead the same. That she and the said Little Soldier continued to live together from and after the time of their said marriage until on or about the 1st day of January, 1915. That during their married life she bore to said Little Soldier eleven (11) children as a result of their said marriage.

That plaintiff and said Little Soldier, because of their being members of the said Ponca Tribe of Indians were allotted certain lands in the Ponca Indian Reservation in Oklahoma, and that trust patents were issued to them for said land so allotted on October 12, 1895, under the provisions of the Act of Congress of February 8, 1887. 21 Stat. L. 388, known as the General Allotment Act, as amended by Act of Congress of February 28, 1891, 26 Stat. L. 794. That this plaintiff and said Little Soldier at said time were residents of the Territory of Oklahoma. That by the issuing of such trust patents to them under the provisions of said Act of Congress, this plaintiff and said Little Soldier acquired the benefit of and became subject to all the laws, both civil and criminal, of the Territory of Oklahoma. That from and after the issuance of said trust patents this plaintiff has resided in and remained a citizen of the territory

of Oklahoma, and of the State of Oklahoma at all times; and that at the time of issuance of said trust patents and at all times thereafter, until the death of Little Soldier, as hereinafter pleaded, said Little Soldier resided in and remained a citizen of the Territory of Oklahoma, and of the State of Oklahoma. That on or about January 1, 1915, the said Little Soldier abandoned and deserted this plaintiff without any fault on her part. That he never was divorced from this plaintiff by any proceeding in any Court, but that on or about [fol. 5] August 12, 1915, he went through a pretended marriage ceremony with one, Alice Eagle White Tail, who was a member of said Ponca Tribe of Indians who had been allotted and had acquired citizenship at the same time and by the same means as this plaintiff and the said Little Soldier had done. That the said Alice Eagle White Tail at the time of her allotment and at all times thereafter, until date of her death, which occurred on or about April 1, 1919, was and remained a citizen, resident and inhabitant of the Territory of Oklahoma and State of Oklahoma. That said Alice Eagle White Tail was the mother of the defendant, Starling White Tail. That from and after said pretended marriage ceremony so entered into between said Little Soldier and said Alice Eagle White Tail, they continued to live together in an adulterous and meretricious relationship until the death of said Little Soldier, which occurred on or about March 1, 1919. That said Alice Eagle White Tail died thereafter on or about April 1, 1919, leaving the defendant, Starling White Tail, a son only son and sole heir. That at the time of the death of said Little Soldier he was seized and possessed of the following allotments and interests therein, in the County of Kay, State of Oklahoma, and in the Western District of the State of Oklahoma, as follows, to wit:

The Southwest Quarter of the Northwest Quarter (S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$) of Section 16, Township 25 North, Ranged 1 East of I. M.; and the Northeast Quarter of the Northwest Quarter (N. E. $\frac{1}{4}$) of the (N. W. $\frac{1}{4}$) of Section 23, Township 25 North, Range 2 East of I. M.; and,

The South half of the Southwest Quarter (S. $\frac{1}{2}$ S. W. $\frac{1}{4}$) of Section 9, Township 25 North, Range 1 East of I. M., same being lands formerly allotted to Fred Holmes Little Soldier, deceased Ponca Allottee No. 477;

An undivided fourteen-fifty fourths ($14/54$) interest in and to the West half of the Northeast Quarter (W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$) of Section 21, Township 25 North, Range 1 East of I. M., same being lands formerly allotted to Crooked Hand, deceased Ponca Allottee, No. 92:

An undivided one-sixth ($1/6$) interest in and to the West half of Lot 5, Section 33, Township 25 North, Range 1 East of I. M., same being lands formerly allotted to Fred Crooked Hand, deceased Ponca Allottee, No. 94; and,

An undivided seven twenty fourths ($7/24$) interest in and to the Southeast quarter of the Northeast Quarter (S. E. $\frac{1}{4}$ of N.

E. ¼) of Section 3, Township 25 North, Range 1 East of I. M.; and the East half of Lot 5, Section 33, Township 25 North, Range 1 East of I. M., same being lands formerly allotted to Lela Crooked Hand, deceased Ponca Allottee, No. 95.

[fol. 6] That at the time of the death of said Little Soldier, he left surviving him this plaintiff, his widow, that he left surviving him no father or mother, no sons or daughters and no issue of any deceased son or daughter, but that he left surviving him one, Adelaide Long Chase, a half-sister, and certain nephews and nieces, being the sons and daughters of deceased brothers and sisters. That under the provisions of said Act of Congress this plaintiff thereby became entitled to inherit from the said Little Soldier's interest in said land in accordance to the laws of the State of Oklahoma where said lands are situated.

That on December 13, 1922, and after the death of said Little Soldier the Secretary of the Interior of the defendant, the United States, did cause a hearing to be held under the rules and regulations prescribed by him, and after notice of such hearing had been duly given to determine the heirs of said Little Soldier, and upon the evidence taken at said hearing did thereafter, to wit, on or about the 28th day of September, 1923, make findings of the heirship of said Little Soldier, which are in writing. That in said written findings the said Secretary of the Interior did find that the said Little Soldier, many years ago married one — — and was divorced from her by Indian custom prior to 1879; that shortly afterwards he married this plaintiff and her sister Ella Little Soldier by Indian custom, living with them as plural wives until the death of Ella Little Soldier on August 17, 1914; that after the death of Ella Little Soldier and prior to January 1, 1915, he abandoned this plaintiff and ceased living with her as her husband and soon thereafter began living with the above named Alice Eagle White Tail. That he was never divorced from this plaintiff by the decree of any Court; that he entered into a marriage ceremony with said Alice Eagle White Tail on August 12, 1915, and that he continued so living with her until his death which occurred on March 1, 1919. That all of such findings of fact of the Secretary of the Interior are correct and are abundantly supported by the evidence taken at said hearing so caused to be held by the order of the said Secretary of the Interior.

That in said Written findings of heirship, the said Secretary of Interior found as a matter of law the said separation of Little Soldier [fol. 7] and this plaintiff, as above pleaded, constituted an Indian custom divorce and that the same was binding upon them, was a valid divorce and rendered Little Soldier capable of contracting marriage with said Alice Eagle White Tail and rendered their marriage on August 12, 1915, valid, and that thereby upon the death of said Little Soldier on March 1, 1919, said Alice Eagle White Tail became his widow and entitled to inherit one-half of his estate. his collateral heirs taking the other half, and that this plaintiff

was not entitled to inherit any portion of the estate of said Little Soldier, deceased. A true and correct copy of which said opinion and findings of the Secretary of the Interior is hereto attached marked "Exhibit A" and made a part hereof.

That at the time of the marriage of this plaintiff and said Little Soldier, which occurred about the year of 1880, and which was referred to and found to exist by said Secretary of the Interior in his said opinion and findings, this plaintiff was a single and an unmarried woman, capable in every way of contracting marriage and said Little Soldier was a single and an unmarried man, capable in every way of contracting marriage. That the said Ella Little Soldier was younger than plaintiff and did not become the wife of Little Soldier until many years after his marriage to this plaintiff. That said facts were abundantly established by the testimony of many witnesses and were not disputed by any one at said hearing. A true and correct copy of the record of said hearing, including statements and admissions of counsel for the respective parties, and all the testimony of all the witnesses given at said hearing is hereto attached, marked "Exhibit B" and made a part hereof. That the Secretary of the Interior Committed error in said decision in applying the law to the said facts so found by him to exist, and in applying the law to the said facts so conceded and established beyond dispute at said hearing. That the Secretary of Interior thus erred in holding and deciding that Little Soldier and this plaintiff having lived together in holy and lawful wedlock for more than 30 years, this marital relationship could be and was dissolved by Little Soldier's abandonment of this plaintiff and living in an adulterous and meretricious relationship with Alice Eagle White Tail when the [fol. 8] plaintiff was in no way at fault. That the Secretary of Interior likewise erred in holding that Little Soldier could then, during the life of this plaintiff and not having been divorced from her, contract a valid marriage with Alice Eagle White Tail. That the Secretary of Interior further erred in applying the law to such facts in said case and in holding and deciding that the defendant, Starling White Tail, was an heir to one-half interest in the estate of said Little Soldier and in excluding plaintiff from inheriting said half interest.

That under the provisions of the said Act of Congress of February 8, 1887, as amended by the said Act of February 28, 1891, under which said described lands were issued to said respective allottees, and under the provisions of said respective trust patents, therefor this plaintiff as one of the heirs of Little Soldier and as an heir to a one-half interest in said estate has and now claims the right that the defendant, the United States, shall hold said land in trust for her, and that she shall receive her said respective portions of the rents and profits of said lands in proportion to her interests in said lands as herein pleaded. That by said decision of the Secretary of the Interior rendered in so determining the heirship of said Little Soldier deceased, the plaintiff is deprived of all of her said rights appertaining to said land; that plaintiff is likely to be further deprived of

her rights therein in that said defendant, Starling White Tail is likely to cause said land or a portion thereof to be sold or to obtain a patent in fee therefor under the provisions of the Acts of Congress authorizing the same; and in the event of the legal title to said lands being retained in the defendant, the United States, until the expiration of the trust period under which it holds said lands, patent in fee therefor will be issued by the defendant, the United States to the defendant, Starling White Tail, and that this plaintiff will be totally deprived of her said rights therein.

That because of said facts, plaintiff has no adequate remedy at law and will be greatly and irreparably injured and damaged unless this court by its decree restore to her her rights which said decision and finding of heirship so made by the Secretary of the Interior in said estate of Little Soldier, deceased, have so wrongfully de-[fol. 9] prived her of.

Wherefore, Plaintiff prays that upon final hearing of this cause that she be ordered and decreed to have and to hold the following interests in the above described Indian allotments, to wit:

An undivided one-half ($1/2$) interest in and to the Southwest Quarter of the Northwest Quarter (S. W. $1/4$ of N. W. $1/4$) of Section 16, Township 25 North, Range 1 East of I. M.; and the Northeast Quarter of the Northwest Quarter (N. E. $1/4$ of N. W. $1/4$) of Section 23, Township 25 North, Range 2 East of I. M.; and Lot 8, Section 23, Township 25 North, Range 2 East of I. M., same being lands formerly allotted to Little Soldier, deceased Ponca Allottee No. 475, 475-A;

An undivided one-half ($1/2$) interest in and to the South half of the Southwest Quarter (S. $1/2$ of S. W. $1/4$) of Section 9, Township 25 North, Range 1 East of I. M. same being lands formerly allotted to Fred Holmes Little Soldier, deceased Ponca Allottee No. 477;

An undivided seven-fifty fourths ($7/54$) interest in and to the West half of the Northeast quarter (W. $1/2$ of N. E. $1/4$) of Section 21, Township 25 North, Range 1 East of I. M., same being lands formerly allotted to Crooked Hand, deceased Ponca Allottee, No. 92;

An undivided one-twelfth ($1/12$) interest in and to the west half of Lot 5, Section 33, Township 25 North, Range 1 East of I. M., same being lands formerly allotted to Fred Crooked Hand, deceased Ponca Allottee, No. 94; and,

An undivided seven-forty eights ($7/48$) interest in and to the Southeast Quarter of the Northeast Quarter (S. E. $1/4$ of N. E. $1/4$) and Lot 1, Section 3, Township 25 North, Range 1 East of I. M.; and the East half of Lot 5, Section 33, Township 25 North, Range 1 East of I. M., same being lands formerly allotted to Lela Crooked Hand, deceased Ponca Allottee, No. 95.

Said interest in said allotments being one-half of the interest held therein by said Little Soldier, deceased Ponca Indian, Allottee No. 475, 475-A. That she be decreed to be an heir to the Estate of said Little Soldier deceased and to inherit a one-half interest in his

said estate. That the finding and determination of heirship, made by the Secretary of the Interior in said estate under departmental decision rendered therein by the Secretary of the Interior on the 28th day of September, 1923, be avoided and set aside in so far as the same decrees the defendant, Starling White Tail, to have a [fol. 10] one-half interest in said estate of Little Soldier and in the interest which Little Soldier had in said described lands at the time of his death and to exclude this plaintiff from any interest in said estate; and that this plaintiff be decreed to have the one-half interest in the estate of said Little Soldier including allotments and interests therein held by said Little Soldier at the time of his death, which was by said decree and finding of heirship held to be in Starling White Tail, and that she have such other general relief as may to the Court be deemed just and equitable.

L. A. Maris, Attorney for Plaintiff.

[fol. 11]

EXHIBIT A TO BILL OF COMPLAINT

Probate 79598-22. 69021-23. C. E. T.

The Honorable the Secretary of the Interior.

MY DEAR MR. SECRETARY:

The papers in the matter of the estate of Little Soldier, deceased allottee No. 475-475-a of the Ponca Tribe, are herewith transmitted for your consideration.

In a decision rendered January 16, 1920, the Department determined the heirs of this allottee to be as follows:

Henryetta First Moon, widow	15/60
Starling White Tail, son of subsequently deceased plural wife	15/60
Adelaide Long Chase, half-sister	10/60
Anna D. Fireshaker, niece	5/60
Ella C. Poor Horse, niece	5/60
Silas McGualey, nephew	2/60
Theodore McCauley, nephew	2/60
Alice McCauley Parker, niece	2/60
Luey Peabody Wood, niece	2/60
Charley Peabody	2/60

Starling White Tail, in a Petition subscribed and sworn to on the 6th day of July, 1920, requested a reopening of the findings and a rehearing upon the grounds largely that Henryetta First Moon, who had been a plural wife of the allottee and who had been given $\frac{1}{4}$ of the estate as widow was not the wife of the decedent at the time of his death and therefore, not entitled to share in the estate.

In a decision rendered October 30, 1922, the Department reopened the findings of January 16, 1920, and also the decision of the Department of May 5, 1921, denying a rehearing and directed that a

rehearing be held upon due notice to all parties in interest for the purpose of determining primarily whether Henryetta First Moon was entitled to inherit as the widow of the allottee.

[fol. 12] Superintendent Hoyo was instructed to hold a rehearing after due notice to all parties in interest. England and Duvall of Ponca City, Oklahoma, and J. W. Beller of Washington, D. C., were given a power of attorney by Starling White Tail to represent him at the rehearing, and L. A. Maris, Attorney at Law, at Ponca City, had a power of attorney from Henryetta First Moon as her attorney, and both Starling White Tail and Henryetta First Moon were represented at the rehearing held by Superintendent Hoyo and took part in the cross-examination of the witnesses. After the investigation had been completed and the report of the Superintendent and the briefs of the attorneys had been submitted, a request was made for a hearing before this Office and this request was granted and at this hearing L. A. Maris appeared in behalf of his client, Henryetta First Moon, and J. W. Beller of Washington, D. C., appeared in behalf of Starling White Tail.

There is very little dispute as to many of the important facts in this case. The allottee, Little Soldier, married Me-he-dah-be or Law Sun many years ago and was divorced from her by Indian custom prior to 1879. He, shortly following this divorce, married Henryetta First Moon and Ella Little Soldier by Indian custom, living with them as plural wives until August 17, 1914, when Ella Little Soldier died. There is some evidence taken to show that Little Soldier was consorting with other women to some extent prior to the death of Ella, but it is quite conclusive that she and her sister, Henryetta First Moon, were the plural wives of Little Soldier from some time in the seventies until the death of Ella in 1914. Following the death of Ella there occurred a separation between Little Soldier and Henryetta First Moon, while it is not quite clear when that separation took place, yet it is definitely shown that it had occurred by January 1, 1915.

It is also definitely proven that prior to January 1, 1915, for some months Little Soldier had been going to see Alice Eagle White Tail and staying with her nights. From January, 1915, he and Alice lived together as husband and wife after the manner of Indian custom marriages. Henryetta endeavored to break up the relations existing between Little Soldier and Alice and she went so far as to give him a beating with a club. Little Soldier, however, continued to live with Alice and on August 12, 1915, they were married by ceremony and continued to live together thereafter as husband and wife until the date of his death on March 1, 1919.

It is proper here to state that Ella Little Soldier made a will which received the approval of the Department April 6, 1915. In this will it is provided that Little Soldier, in order to share in the estate, must continue to live with and care for his plural wife, Henryetta First Moon, during her lifetime or until his own death. Little Soldier in his testimony in this case, was defiant and showed a strong unwillingness to comply with the provisions of the will. As a result, the approval of the will by the Department found that Little

Soldier had broken the condition in the will and that he should have no share in the estate and that both the real and personal property should go to Henryetta First Moon in accordance with the provision of the will. After Henryetta First Moon found that Little Soldier would not live with her or in any way recognize her as his wife, she brought an action for divorce which was dismissed upon the ground that the Court had no jurisdiction.

Following the separation of Little Soldier and Henryetta First Moon she assumed marital relations with Buffalo Chief, Ponca Al-[fol. 14] lottee No. 470, and on January 27, 1917, was legally married to him by the County Judge of Kay County, Oklahoma. She and Buffalo Chief continued to live together as husband and wife until the date of his death, February 5, 1920. The heirs of Buffalo Chief were first determined January 22, 1921, to be his son, Robert Upshaw Other, and his daughter Ethel Buffalo Chief, each entitled to $\frac{1}{2}$ of the estate. Henryetta First Moon was refused recognition as his wife because at the time of their marriage she was considered the wife of Little Soldier. This decision, however, was later modified upon the ground that after the death of Little Soldier she and Buffalo Chief consummated a common law marriage and in a decision dated October 22, 1921, she was given $\frac{1}{3}$ of the estate as the common law wife. It should be stated here, however, that Henryetta First Moon was the legal wife of Buffalo Chief from the time of her marriage to him until his death.

The contention of Starling White Tail is that Henryetta First Moon was not the wife of Little Soldier at the time of his death and was not entitled to any share in his estate; that on the contrary, his mother, Alice Eagle White Tail, was the legal wife of Little Soldier at the time of his death and entitled to $\frac{1}{2}$ of his estate, and that upon her subsequent death he inherited this $\frac{1}{2}$ interest as the sole heir.

The attorney for Henryetta First Moon, in his argument before this Office, contended that both Henryetta First Moon and Little Soldier had been allotted under the Act of February 8, 1887, receiving trust patents in 1895, and that they thereby became citizens and were, therefore, amenable to the laws of Oklahoma and that they could be divorced only in accordance with the laws of the State, and that Henryetta continued to be the wife of Little Soldier up to the [fol. 15] time of his death. This contention is erroneous as shown by the many decisions of the Department. It is not necessary to quote these decisions, but reference will be made to a few of them, as follows:

Pis-shed-win, deceased Pottawatomie Allottee. Probate 103027-11;
 Mary Surrell, deceased Shoshone Allottee. No. 348." 104151-13;
 Grace Moon Isis, deceased Shoshone Allottee. No. 958. Probate 34725-14;
 Pah-gum-way-way-ke-shig, deceased Allottee. No. 2109. Probate 47482-18.

In the last named case in an opinion dated July 24, 1920, signed by Assistant Secretary Hopkins, it is stated that the Courts have re-

peatedly held that the tribal relations and government wardships are not disturbed by the making or taking of allotments and that citizenship such as exists under the provisions of the General Allotment Act of 1887 is neither inconsistent nor incompatible with the status of a tribal Indian. In support of this position the opinion quotes the decisions of Courts and among such decisions that in the case of the United States v. Nice. The decision also calls attention to the fact that divorces by Indian custom while the parties are wards of the government, are, in view of the Department, valid divorces dissolving the prior marriage relations, no matter what may have been the method or the manner by which the marriage relation was assumed.

The attorney for Henryetta First Moon contended that the Ponca Indians were not tribal Indians; that they were not living in tribal relations; that their reservation had been broken up and now was under the jurisdiction of the counties in which the land might be located. Some of the land of this reservation, it is true, has been sold and many whites probably live among these Indians. This fact does not, however, change the wardship of the government towards these Indians and jurisdiction over their trust property. They are still [fol. 16] wards of the government, their allotments held in trust are still under the jurisdiction of the government. An agency is maintained for their benefit and welfare, and these Indians are considered, both by the administrative department of the government and also by Congress as a tribe, and Congress yearly appropriates money for their benefit.

When Little Soldier and Henryetta First Moon separated they were tribal Indians and continued to be tribal Indians, and Little Soldier continued to be a tribal Indian up to the time of his death, and Henryetta First Moon has continued to be a tribal Indian until the present time. Their separation constituted an Indian custom divorce, just as binding as a divorce rendered by decree of Court, and after this separation both were free to take other spouses, and Little Soldier proceeded to marry Alice Eagle White Tail, as heretofore stated, and Henryetta First Moon married Buffalo Chief. It is not shown in the evidence, and neither is their any contention, that Little Soldier and Henryetta First Moon, after their separation, about January 1, 1915, ever resumed marital relations. On the contrary, it is definitely shown that Little Soldier considered himself divorced from her by Indian custom and free to enter into the marriage relation with Alice Eagle White Tail, and Henryetta First Moon considered herself free to enter into a marriage with Buffalo Chief and did enter into such a marriage. Consequently, upon the death of Little Soldier, Henryetta First Moon was not his wife and was not entitled to any interest whatever in his estate. It is, therefore, recommended that the findings of January 16, 1920, awarding her $\frac{1}{4}$ of the estate as the widow be modified by eliminating her as the widow, and by finding that Starling White Tail, son of the subsequently deceased wife, Alice Eagle White Tail, who died March 24, 1919, is entitled to $\frac{1}{2}$ of the estate.

[fol. 17] In the decision of the Department reopening the findings of January 16, 1920, it is provided that all the rights of the other

heirs as set forth in the determination of the Department be determined. Mr. E. A. Upton, Examiner of Inheritance, found that the decedent's own allotment and that inherited from his prior deceased son, Fred Holmes Little Soldier, descended to his widow, Alice Eagle White Tail, and to his half-sister, two nieces of the whole blood, two nieces of the half-blood, and three nephews of the half-blood. He found that the other inherited lands of the allottee all descended to the wife, Alice Eagle White Tail.

A careful consideration of the facts and the law of Oklahoma relating to the half-blood leads to the conclusion that the decision of the Department of January 16, 1920, was to the interests taken by the half-sister and the nieces and nephews is correct. It is therefore recommended that the findings of January 16, 1920, be modified to read as follows, thereby eliminating Henryetta First Moon and widow as hereinabove set forth.

Starling White Tail, son of subsequently deceased wife, Alice Eagle White Tail.....	30/60
Adelaide Long Chase, half-sister.....	10/60
Anna D. Fireshaker, niece (Daughter of prior deceased sister)	5/60
Ella C. Poor Horse, niece (daughter of prior deceased sister) ..	5/60
Silas McCauley, nephew (son of prior deceased half-sister) ..	2/60
Theodore McCauley, nephew (son of prior deceased half-sister)	2/60
Anna McCauley Parker, niece (daughter of prior deceased half-sister)	2/60
Lucy Peabody Wood, niece (daughter of prior deceased half-sister)	2/60
Charley Peabody, nephew (son of prior deceased half-sister) ..	2/60

Respectfully, (Signed) Chas. H. Burke, Commissioner.

9. CS. 22.

[fol. 18] Department of the Interior, Office of the Secretary

Sept. 28, 1923.

The decision of the Department of January 16, 1920, determining the heirs of Little Soldier, deceased allottee No. 475-475-a of the Ponca Tribe, are hereby modified by eliminating Henryetta First Moon as widow, and I find and adjudge that at the date of the hearing held October 11, 1919, the heirs to the estate of the decedent and their respective shares were, as follows:

Starling White Tail, son of subsequently deceased wife, Alice Eagle White Tail.....	30/60
Adelaide Long Chase, half-sister.....	10/60
Anna D. Fireshaker, niece (Daughter of prior deceased sister)	5/60
Ella C. Poor Horse, niece (daughter of prior deceased sister) ..	5/60
Silas McCauley, nephew (son of prior deceased half-sister) ..	2/60

Theodore McCauley, nephew (son of prior deceased half-sister)	2/60
Anna McCauley Parker, niece (daughter of prior deceased half-sister)	2/60
Lucy Peabody Wood, niece (daughter of prior deceased half-sister)	2/60
Charley Peabody, nephew (son of prior deceased half-sister) ..	2/60

(Signed) F. M. Goodwin, Assistant Secretary.

(Exhibit "B" of this Bill is omitted by request as stated in the præcipe for transcript.)

Endorsed: Filed in District Court on December 14th, 1923.

[fol. 19]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF THE UNITED STATES TO DISMISS—Filed February 20, 1924

Comes now United States of America, by Roy St. Lewis, Assistant United States Attorney for the Western District of Oklahoma, and moves the court to dismiss the bill filed in this cause, because said bill does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against this defendant.

And for the further reason that said bill shows upon its face that it is in effect an application to this court to determine the heirs of a deceased Indian allottee; and said bill shows upon its face that said heirship has been finally and conclusively determined by the Secretary of the Interior of the United States of America, whose decision has become final and conclusive.

Wherefore, for the reasons above stated, this defendant prays judgment of this honorable court, whether he shall be compelled to make any further answer or defense to the bill herein and humbly prays that said bill be dismissed at the cost of the plaintiff.

Roy St. Lewis, Assistant United States Attorney.

[File endorsement omitted.]

[fol. 20]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF STARLING WHITE TAIL TO DISMISS—Filed January 8, 1924

Comes now Starling White Tail, one of the defendants above named and moves the court to dismiss the bill filed in this cause,

because said bill does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated, sufficient to entitle plaintiff to any relief against this defendant.

And for the further reason that said bill shows upon its face that it is in effect an application to this court to determine the heirs of a deceased Indian allottee; and said bill shows upon its face that said heirship has been finally and conclusively determined by the Secretary of the Interior of the United States of America, whose decision has become final and conclusive.

Wherefore, for the reasons above stated, this defendant prays judgment of this honorable court, whether he shall be compelled to make any further answer or defense to the bill herein and humbly prays that said bill be dismissed at the cost of the plaintiff.

F. C. Duvall, Solicitor for Defendant Starling White Tail.

[File endorsement omitted.]

[fol. 21]

IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE DISMISSING CAUSE—Filed August 5, 1924

Upon consideration of the Motion of Starling White Tail, Defendant, and the Motion of The United States, Defendant, to dismiss the bill of the plaintiff and dismiss said cause, coming on for consideration this 5th day of August, 1924 before this court sitting at Guthrie, Oklahoma, said Motion having been argued before this Court sitting at Oklahoma City, on March 6, 1924, and then having been taken under advisement, the court now after due consideration thereof, orders, considers, adjudges and decrees that this Court is without jurisdiction of the controversy presented by the bill and that said Motions to dismiss be and the same are hereby sustained and said cause is dismissed, at plaintiff's costs, to which ruling of the Court the plaintiff excepts.

John H. Cotteral, Judge.

O. K. L. A. Maris, Attorney for Plaintiff.

O. K. F. C. Duvall, Attorney for Defendant Starling White Tail,

O. K. Roy St. Lewis, Attorney for Defendant United States.

[File endorsement omitted.]

[Title omitted]

OPINION, DEMURRER—Filed August 5, 1924

The plaintiff sues to establish an interest in certain allotted lands of Little Soldier, in the Ponca Indian Reservation in this state, by virtue of being his widow and heir. The case has been submitted for final decree upon the demurrers of the defendants to plaintiff's bill.

It is alleged that the plaintiff and Little Soldier were members of the Ponca Tribe in Nebraska, and married there according to tribal custom; that allotments were made to them in the Ponca Reservation, in Oklahoma, where they then resided, pursuant to the General Allotment Act of February 8th, 1887, (24 Stat. 388) as amended by the Act of February 28th, 1891, (26 Stat. 794); that Little Soldier resided there until his death, on March 1st, 1919, and the plaintiff still resides there; that 11 children were born as an issue of said marriage; that Little Soldier abandoned the plaintiff about January 1st, 1915, but was never divorced by any Court; that about August 12th, of that year he married Alice Eagle White Tail pursuant to tribal custom, and that they lived together as husband and wife until his death; that Starling White Tail, is her son and only heir; that if plaintiff was the wife of Little Soldier at his death, she is entitled to inherit one-half of his estate, consisting of the several interests in the allotments described in the bill.

[fol. 23] The bill also recites that by the findings of the Secretary, Little Soldier was married to plaintiff pursuant to Indian custom; that he was also married to her sister, Ella Little Soldier, by such custom, living with his plural wives until the death of the latter on August 17th, 1914; that after her death and prior to January 6th, 1915, he abandoned the plaintiff and began living with Alice Eagle White Tail; that he was never divorced from the plaintiff by decree of court; that the Secretary found said separation of Little Soldier and the plaintiff constituted a divorce by Indian custom that was valid, whereby Alice White Tail became his widow and was entitled to inherit one-half of his estate, and that the plaintiff was not entitled to any portion of it.

It appears further from the bill that on January 16th, 1920, after notice and hearing, the heirs of Little Soldier were determined by the Interior Department. By letter of September 28th, 1923, the former decision was modified, and thereby the plaintiff was eliminated as the widow of Little Soldier, one-half of his estate being awarded to the defendant, Starling White Tail.

The complaint is that the Secretary erred in applying the law to the facts by him found to exist, in that it was determined that the marital relationship between the plaintiff and Little Soldier was dissolved by his abandonment of plaintiff and living with his second wife, that Little Soldier could then contract a lawful marriage with her, that the defendant, Starling White Tail was an heir to the

one-half of the estate in controversy, and that the plaintiff be excluded from any interest therein.

It is apparent that the real controversy before the Department was whether Little Soldier was legally divorced from the plaintiff by Indian custom and without a decree of court, and it is contended that the divorce laws of this state applied to these Indians as provided by Section 5 of the General Allotment Act, and that accordingly there was never any valid divorce between the plaintiff and Little Soldier. But it is necessary, of course, that this court should have jurisdiction to entertain and decide this cause in equity before the controversy may be considered and determined.

The Act of June 25th, 1910 (36 Stat. 855) provides:

"That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

To sustain the jurisdiction of this Court, counsel for the plaintiff cites and relies upon the case of *Dixon versus Cox*, 268 Fed. 285, this Circuit, where it was held that while the Secretary of the Interior has the authority to decide a question of heirship under the Act of June 25th, 1910, his decision may be avoided by a decree in a Federal Court for error of law as applied to the facts, conceded, found, or undisputed. That decision was predicated on many cases arising out of conflicting claims in the Executive Departments.

But the Supreme Court, in *Hallowell v. Commons*, 239 U. S. 506, held that the Act of 1910 vested in the Secretary the exclusive jurisdiction to determine the heirs of allottees, and took away the jurisdiction which had theretofore been conferred upon the Federal courts. That case affirms the holding of the Circuit Court of Appeals for this Circuit, (210 Fed. 793), wherein it was ruled that Congress had the power to and did, by the Act of June 25th, 1910, withhold the jurisdiction of the Federal Courts over these allotment controversies. And in *United States versus Bolling*, 256 U. S. 484, it was decided that: "Congress may authorize and require the Secretary of the Interior to determine the legal heirs of a deceased allottee, and may make that determination final and conclusive."

It is quite true that upon the decisions which led to the holding in the *Dixon-Cox* case, suits were often brought in the courts to revise and correct errors of law in departmental decisions, notably those arising in the disposition of public lands. And if those cases were applicable, this Court under its equity powers would be authorized to inquire and determine whether in the present case as a matter of law there was a legal divorce between the plaintiff and Little Soldier, and she remained his wife until his death, and therefore is entitled to inherit the widow's share of his allotted lands.

But whatever view this Court might take of the Secretary's decision on that subject, the difficulty is that there is no jurisdiction to

review or correct it. In general, the equity jurisdiction of this Court extends to declaring trusts in favor of unsuccessful litigants in the Executive Departments, and determining whether they should have prevailed, upon correct principles of law. But Congress had the undoubted constitutional right to withhold jurisdiction from the Federal courts in such a case as this suit presents, and in my opinion it has done so effectually by providing in the Act of June 25th, 1910, that the jurisdiction of the Secretary shall be exclusive and final. That declaration does not mean that his action shall be exclusive, subject to review as to matters of law in a Federal equity court, but, instead, that the sole power of deciding between contesting heirs to allotments is vested in the Secretary of the Interior.

[fol. 26] This Court is held to be without jurisdiction to entertain the controversy presented by the bill, and it will, therefore, stand dismissed.

John H. Cotteral, District Judge.

Guthrie, Oklahoma, August 5th, 1924.

[File endorsement omitted.]

[fol. 27]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Hon. John H. Cotteral, District Judge:

The above named plaintiff, Henrietta First Moon, conceiving herself aggrieved by the order entered herein on the 5th day of August, 1924 in the above entitled proceeding, decreeing that this Court was without jurisdiction of the controversy presented by the bill and dismissing said bill and said proceeding upon the ground that the Court had no jurisdiction thereof, does hereby appeal from said decree and order to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith, and she prays that her appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner further prays that the proper order touching the security to be required of her to perfect her appeal be made.

L. A. Maris, Attorney for Plaintiff, Appellant.

Ponca City, Oklahoma.

[fol. 28]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Sept. 22, 1924

And now, to wit: On 22 day of September, 1924; it is ordered that the appeal from the order of the Court made August 5, 1924, that this Court had no jurisdiction of the controversy presented by the bill and dismissing said bill and said cause for want of jurisdiction, be allowed as prayed for upon giving bond conditioned as required by law in the sum of \$300.00.

R. L. Williams, District Judge.

[File endorsement omitted.]

[fol. 29]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 22, 1924

Now on this the 22 day of September, 1924 comes the plaintiff by her solicitor, L. A. Maris and says that the decree entered in the above case on the 5th day of August, 1924 is erroneous and unjust to the plaintiff.

(1) Because it sustained the motion of the defendant, Starling White Tail, to dismiss the bill of the plaintiff.

(2) Because it sustained the motion of the defendant, The United States, to dismiss the bill of the plaintiff.

(3) Because it decreed that this court had no jurisdiction of the controversy presented by the bill of the plaintiff.

(4) Because it ordered that this proceeding stand dismissed for want of jurisdiction.

E. Barrett Prettyman, L. A. Maris, Solicitors for Plaintiff.

[File endorsement omitted.]

[fols. 30 & 31] BOND ON APPEAL FOR \$300—Approved and filed September 22, 1924; omitted in printing

[fol. 32]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed September 22, 1924

It is hereby stipulated by Counsel for both parties in the above cause that the Clerk, in making up the Transcript include the following documents, to-wit:

- (1) The bill of the plaintiff, including Exhibit "A" and not including Exhibit "B" which may be omitted therefrom.
- (2) The motion of the defendant, The United States, to dismiss the bill of the plaintiff.
- (3) The motion of the defendant, Starling White Tail, to dismiss the bill of the plaintiff.
- (4) The order and decree of the court dismissing the bill and the cause for want of jurisdiction.
- (5) The opinion of the court as to dismissal of this cause.
- (6) Plaintiff's Assignment of Errors.
- (7) Plaintiff's Petition for Appeal.
- (8) Plaintiff's Bond on Appeal.
- (9) Order of the Court allowing appeal.
- (10) Citation.
- (11) Copy of this Stipulation.

L. A. Maris, Solicitor for Plaintiff. F. C. Duvall, Solicitor for Defendant Starling White Tail. Roy St. Lewis, Solicitor for Defendant The United States.

[File endorsement omitted.]

[fol. 33]

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PRINTING RECORD—Filed September 22, 1924

Comes now Henrietta First Moon, Plaintiff in the above entitled action, and elects and gives notice that she desires to have the Transcript of this Proceeding printed under direction of the Clerk of the Supreme Court of the United States, after the certified Transcript shall have been filed there.

L. A. Maris, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 34]

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Harry L. Finley, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in case Number 626, In Equity, wherein Henrietta First Moon, is plaintiff, and Starling White Tail and The United States, are defendants, as full, true and complete as the said transcript purports to contain and as called for by the præcipe for transcript of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the City of Guthrie, in said District, this 17th day of October, A. D. 1924.

Harry L. Finley, Clerk, by Theodore M. Filson, Deputy.
(Seal of the United States District Court, Western District of Oklahoma.)

Endorsed on cover: File No. 30,668. W. Oklahoma D. C. U. S. Term No. 703. Henrietta First Moon, appellant, vs. Starling White Tail and The United States of America. Filed October 21st, 1924. File No. 30,668.

(5865)